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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-280

THOMAS G. S. CHRISTENSEN, NEW YORK TYPOGRAPHICAL UNION NO. 6, ET AL., *Petitioners,*

v.

NEW YORK TIMES COMPANY, ET AL., *Respondents.*

BRIEF FOR RESPONDENT NEW YORK TIMES COMPANY IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT NEW YORK TIMES COMPANY IN OPPOSITION.

The petition herein seeks review of a decision by the United States Court of Appeals for the Second Circuit entered May 15, 1973. The decision of the court of appeals affirmed the opinion and judgment of the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, issued on May 15, 1973, is reported at 83 LRRM 2410. It is reprinted in the Appendix to the petition, p. 1a*, *et seq.*

* Citations with the suffix "a" are the pages of the Appendix to the petition.

The opinion of the United States District Court for the Southern District of New York (Tyler, J.), rendered on June 26, 1972, is reported at 344 F.Supp. 194. It is reprinted in the Appendix to the petition, p. 7a, *et seq.*

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether under the provisions of Section 302(c)(5) of the Labor Management Relations Act, the trustees of a jointly administered trust fund may lawfully pay benefits to persons who, though employed in the New York newspaper industry, are not and have not been employes of employers contributing to the jointly administered trust fund.

Statutory Provisions Involved

The pertinent provisions of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 are set forth in the petition at page 3.

Section 186 of the Labor Management Relations Act of 1947 is reprinted in its entirety in the respondent's Appendix hereto, p. 1a, *infra.*

Statement of The Case

In the decade of the 1960's, the newspaper publishers in New York City including The New York Times and the Post negotiated agreements with the union which authorized them to set in type stock market tables through the use of tape (known as Outside Tape) received from the Associated Press or United Press International (App. 77a).* The use

* Citation to "App." followed by page number are to the Joint Appendix in the court of appeals which has been furnished to this Court.

of such tape eliminates the need to have employes in the composing room of a publisher set the stock market tables by hand or by machine. It was further negotiated that a publisher using such Outside Tape would make payments equal to the wage value of the number of hours of composing room work saved through the use of Outside Tape (App. 80a).

Not all publishers adopted Outside Tape. Among the publishers who have not adopted Outside Tape are the New York News, Inc. and other smaller publishers under contract to the union (App. 55a-56a, 77a).

A Taft-Hartley Act Trust, pursuant to Section 302(c) of that law (technically the Labor Management Relations Act of 1947), was established. Initially there were separate trusts for each employer utilizing outside tape and contributing to the Fund (App. 55a-56a). These separate trusts were later merged into a single trust known as the Outside Tape Fund to which contributions were made only by publishers using Outside Tape (App. 56a).

In 1971 the union-trustees proposed a plan under which supplemental unemployment benefits would be payable to any employe of a newspaper publisher having a contract with the union whether or not the employer had ever contributed to the Outside Tape Fund (App. 21a, 58a). Under such proposal, the employes of publishers not using Outside Tape and not contributing to the Outside Tape Fund, such as the employes of the New York News, Inc. and other smaller publishers, would be eligible to receive the benefits.

The employer-trustees contended that the proposal of the union-trustees to be lawful must limit the payment of the proposed benefits to employes of contributing employers (App. 59a).

The dispute was submitted to arbitration before Arbitrator Thomas G. S. Christensen, one of the petitioners herein.

He was directed to determine whether the collective bargaining agreements and the trust agreement authorized the adoption of the union trustees' proposal under which benefits would be paid to employes of non-contributing employers. (App. 23a, 25a). The arbitrator found that the union trustees' proposal would comply with the collective bargaining agreements and the trust agreement.

The Arbitrator then proceeded as directed by the arbitration agreement to petition the United States District Court for the Southern District of New York for a declaratory judgment as to the legality of such a benefit plan under Section 302 of the Labor Management Relations Act.

The District Court denied the petition, holding that under Section 302 it was not lawful for the trust in question to utilize trust funds to benefit employes who are not and never have been employes of contributing employers. The Second Circuit affirmed with Judge Wyzanski dissenting.

Argument

1. The decision below was correctly decided.

Respondent submits that both contentions urged by the petitioners as meriting review by this Court on certiorari are grounded fundamentally on the petitioner's disagreement with the failure of the court below to accept or adopt the factual contentions urged by the petitioner.

Petitioners' consistently throughout these proceedings have urged that the employer-employe relationship between typographical employes employed in the individual composing rooms of The Times and the Post should be ignored or disregarded, and urge that these employes are really employed by the newspaper industry of New York. Petitioners then argue that when the typographical employes at The Times and the Post are viewed as employed by the

newspaper industry, the instant situation becomes analogous or equatable to a "shape-up" employment situation on the Philadelphia waterfront and should have been decided in accordance with *Bey* v. *Muldoon*, 223 F.Supp. 489 (E.D.Pa., 1963), aff'd, 354 F.2d 1005 (3rd Cir. 1966), cert. denied, 384 U.S. 987 (1966).

The opinion of the court below specifically affirmed that there was a real and distinct factual differentiation extant between the employment situation of typographical workers employed by the Times and the Post in New York City and the employment situation of stevedores employed on the Philadelphia waterfront. The court below affirmed the factual findings of Judge Tyler that the employment situation of typographical workers at the Times and the Post was not the employment situation of a shape-up on the Philadelphia waterfront. It affirmed that the typographical workers are employed by newspaper publishers on a full-time permanent basis in contrast to the "peripatetic" nature of waterfront employment.

The court below specifically dismissed petitioners' contention that the issue be determined by the *Bey* case, pointing out:

> "It suffices to point out that the result in *Bey* rested on the peculiar nature of the use of longshoremen on the Philadelphia waterfront; the longshoremen worked for the "waterfront" rather than for any particular stevedoring company. It is apparent from the record developed here that, unlike the Philadelphia longshoremen, the vast majority of typographical workers at The Times and the Post are employees of one newspaper employer. Thus *Bey* is not persuasive authority for the contention of appellants." (83 LRRM at 2411; (4a)).

Clearly, the underlying contention urged by the petitioners' presents only a disagreement with the factual analysis and findings in the proceedings below and in no way warrants review on certiorari by this Court.

2. The decision below does not reflect a conflict between the Second and Third Circuits as to the application and interpretation of § 302(c)(5).

The petitioners' have principally relied throughout these proceedings and urge before this Court the failure of the court below and of the district court to adopt as applicable to the respondent the peculiar and unique factual situation present in *Bey* v. *Muldoon, supra.* The principal opinion in that case is that of Judge Lord in the District Court proceedings wherein he found in the peculiar facts of that employment situation that the "waterfront was the employer." The Third Circuit's brief affirming *per curiam* opinion in that case cannot be urged as conflicting with the opinion of the court below in view of the fact that the *Bey* opinion addressed only the unique and peculiar factual findings present in the record.

In the District Court decision in the instant case, Judge Tyler specifically found that:

> "On the record as presently constituted, petitioner has failed to establish that typesetters work for every publisher and that publishers as a group should be considered as the employer in applying § 302(c)(5)." 344 F.Supp. at 198.

Indeed in the instant case Judge Tyler prior to issuance of his decision specifically extended to all interested parties a period of 21 days to introduce any further evidence on the factual question that employment practices in the New York

newspaper industry more closely approximate those found on the Philadelphia waterfront. No interested party availed itself of such an opportunity. (App. 105a).

Respondent further submits that, contrary to petitioners' urging, the decision of the court below reflects a consistent continuum of judicial interpretation of Section 302(c)(5) on the issue at hand. *Moglia* v. *Geoghegan*, 403 F.2d 110, 113 (2nd Cir. 1968), cert. denied, 354 U.S. 919 (1969); *Blassie* v. *Kroger Company*, 345 F.2d 58, 71 (8th Cir. 1965); *Operative Plasterers' Cement Mason International Association* v. *Paramount Plastering Inc.*, 310 F.2d 179, 191, 186 (9th Cir. 1962), cert. denied, 372 U.S. 144 (1963).

Clearly, the lawfulness of the benefit payments here in question must be first examined in terms of the existing employer-employe relationship—that is, the benefiting employe must have an employer, who lawfully contributed. The court below properly affirmed that The Times and the Post were the respective employers of their own typographical workers. On such finding, the court, it is submitted, properly and consistently found that Section 302(c)(5) prohibited trust fund payments to the employes of either a non-contributing employer, or the employes of an employer who had never contributed.

3. The decision of the court below does not raise important questions of statutory construction.

Petitioners' urge that the court interpreted § 302(c)(5) in its most literal sense and in disregard of its legislative history and the evils that Congress sought to outlaw. It is submitted that again petitioners' contention is but a cloak for its disagreement with the affirmance by the court below of the factual findings that there is a difference and a dis-

tinction between typographical workers employed by The Times and the Post and stevedores on a "shape-up" at the Philadelphia waterfront for whom the "waterfront" is the employer. It is submitted that the court below, at most, applied the language of the statute to the factual situation established by the record. The factual situation clearly established that there was an employer-employe relationship between The Times and the Post and their typographical employes. What the petitioner sought in the courts below was an amendment of the statute rather than an interpretation. The court below properly declined to amend the statute to allow trust funds to expend moneys even for laudable purposes when not within the purview of the statute. It is submitted that the decision of the court below should in no sense be misconstrued as a strict or overly literal interpretation of Section 302(c)(5) but rather as in accord and consistent with decided judicial precedent that it is for the Congress to enact further exemptions in Section 302(c)(5).*

In *Operative Plasterers' and Cement Mason International Association* v. *Paramount Plastering Inc.*, 301 F.2d 179 (9th Cir. 1962), *cert. denied*, 372 U.S. 944 (1963), the Court in a detailed analysis of the scope and purpose of Section 302

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* That the prerogative of deciding and determining those specific purposes and beneficiaries to which joint Trust Fund moneys may be expended is vested solely in the Congress is shown by the history of legislative amendment to Section 302(c). Thus it was necessary to obtain specific legislative amendment to Section 302(c) to permit trust funds to be established for the obviously laudable purposes of providing vacation, holiday, severance or similar benefits or defraying costs of apprenticeship or other training programs (subdivision 6 added to Section 302(c) by Section 505 of the Labor Management Reporting and Disclosure Act of 1959 enacted September 14, 1959) and educational scholarships and day care centers (Subdivision 7 added to Section 302(c) by Public Law 86, 91st Congress, 83 Stat. 133 enacted October 14, 1969).

affirmed a lower court judgment that an Industry Program, Institute Trust and Labor-Management Relations Trust were not within the exemptions created by Congress and not permissible objects for the use of joint trust funds. In conclusion, the Court said:

> "We do not quarrel in the slightest with the laudable objectives of the trust amicably created by labor and management in this case. We sympathize with the efforts of both labor and management to solve a vexing industry problem. But like so many of such present day problems, our duty is to rule in accordance with that which the Congress (quote) in its wisdom (end of quote) has seen fit to enact. We cannot widen the door when the door sill has been carefully tailored by the representatives in Congress." (310 F.2d at 191).

In *Blassie* v. *Kroger Co.*, 345 F.2d 58 (8th Cir. 1965), the Court was presented with a variety of Section 302 questions. One of these questions involved the lawfulness under Section 302 of payments by a jointly administered trust fund to retired employes whose employers had never contributed to the fund. In finding such a disposition of trust funds unlawful, even under a policy of construction favoring inclusion of benefits, absent positive statutory language to the contrary, the Court was constrained to find that:

> "... the statute does not, and the trust agreement therefore cannot permit the extension of benefits to persons who have never been in the active employ of a contributing employer or to those who, although having been in active employment, were not covered by employer contributions." (345 F.2d at 71).

Thus, it is submitted that the interpretation of the Section 302(c)(5) by the court below was in accord with de-

cided judicial precedent that trust moneys may not be paid to and enjoyed by employes of an employer who has never made a contribution on their behalf. Accordingly, the decision below did not raise questions of statutory construction which would warrant review by this court on certiorari.

Conclusion

For the reason stated the petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

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